STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of GREGORY LEONOWICZ, Deceased

JOHN LEONOWICZ,

Petitioner-Appellee,

v

MARY ANN WROUBEL,

Respondent-Appellant.

UNPUBLISHED
December 5, 2006

No. 260735
Washtenaw Probate Court
LC No. 04-000887

Before: O'Connell, P.J., and White and Markey, JJ.

PER CURIAM.

Respondent appeals by right from an order of the probate court requiring her to pay petitioner's attorney fees incurred with respect to his petition to remove her as trustee of an educational trust set up for the benefit of petitioner's two sons. Respondent also challenges the lower court's order that she pay petitioner's attorney fees related to her motion for reconsideration of the first attorney fees award. We affirm in part and reverse in part.

The deceased was the father of petitioner and respondent and grandfather of the trust beneficiaries. By way of a settlement agreement reached between the parties, the trust was funded for each beneficiary in the amount specified in the deceased's will, ($30,000), less respondent's attorney fees (approximately $4,000). When petitioner's oldest son was accepted into Kalamazoo College, the parties disagreed on releasing funds from the trust. During the course of this dispute, petitioner completed and signed on August 4, 2004 a withdrawal request from the trust even though respondent was listed as the owner of the account. Eventually, petitioner filed to remove respondent as trustee. Petitioner also requested that respondent be ordered to pay petitioner's legal fees related to filing the motion. Respondent then wrote petitioner, agreeing to release the funds to Kalamazoo College and to step down as trustee. She also stated that she would not attend the hearing on the petition to remove because she could not afford an attorney. At the motion hearing, petitioner informed the court that respondent had agreed to step down. The court then ordered that respondent be removed as trustee, that respondent pay petitioner's attorney fees, and that respondent pay a guardian ad litem to review the trustee change.

Thereafter, respondent moved for rehearing and reconsideration regarding the award of attorney fees. The trial court denied her request to vacate the award and ordered her to pay petitioner's attorney fees stemming from the motion for rehearing and reconsideration. Respondent then obtained counsel who filed an objection to both attorney fees awards. After another motion hearing, the trial court again ordered respondent to pay petitioner's attorney fees as well as the guardian ad litem fee.

Respondent argues that the first award of attorney fees was improper. Because respondent did not attend the hearing on the petition to remove, she did not timely object to the award of attorney fees. Cf. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 556; 620 NW2d 646 (2001) (observing that an issue first raised in a motion for reconsideration "appear[s] to be tardy"). Therefore, we review this unpreserved issue for plain error affecting substantial rights. *Phinney v Perlmutter*, 222 Mich App 513, 556-557; 564 NW2d 532 (1997).

With respect to the guardian ad litem fee, petitioner has not briefed this issue in any real sense beyond requesting that it be vacated. Indeed, it was not specifically raised in her presentation of the issues to be addressed on appeal. Thus, any challenge to this portion of the award has been abandoned. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Accordingly, we affirm the guardian ad litem fee portion of the trial court's order.

"Under the 'American rule,' attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). A court errs as a matter of law if it awards attorney fees solely on the basis of equitable principles. *In re Adams Estate*, 257 Mich App 230, 237; 667 NW2d 904 (2003).

We conclude that the trial court committed plain error in ordering respondent to pay petitioner's attorney fees with respect to the petition to remove. It is unclear from the record the legal basis on which the award was made. All the probate court indicated was that it "felt under all of the circumstances in this case that it was appropriate to" award attorney fees. The court could not have awarded fees under MCR 2.114(E) because such sanctions apply to signing a document in violation of MCR 2.114. Respondent signed no pleadings relative to the petition to remove.

Further, respondent's retention of attorney fees when funding the trust, cited by petitioner as a reason to award him attorney fees, was part of a settlement reached between petitioner and respondent. To award petitioner attorney fees based on the fact that respondent had earlier retained attorney fees is an equitable argument that cannot support the award. *In re Adams Estate*, *supra* at 237. The argument that attorney fees should be awarded because respondent allegedly improperly contacted the sheriff following petitioner's filing of the August 4, 2004 withdrawal request is also an appeal to equity that cannot justify the award. In any event, to the extent that any of respondent's conduct was wrongful (which neither the probate court specifically found nor do we so find), there is no indication that the requested fees were the result of this allegedly wrongful conduct. *Reed*, *supra* at 164-166.

We also agree with respondent's argument that the probate court abused its discretion in imposing the second attorney fees award. When petitioner first requested the second award of

attorney fees, he argued that such an award was justified because he had wanted to avoid litigation and because he earlier had to pay respondent's attorney fees in setting up the trust and his own attorney fees in reaching the settlement agreement. Petitioner has not cited any legal authority by which attorney fees would be recoverable because the prevailing party would have preferred to avoid litigation. *Id.* at 164. As previously discussed, petitioner's argument regarding the attorney fees the parties agreed to as part of a settlement is an equitable argument that cannot justify the award. *In re Adams Estate*, *supra* at 237.

Arguably, MCR 2.114(E) could form the basis of an argument justifying the second award of attorney fees because respondent signed her motion for reconsideration. However, petitioner only raised the argument that he was entitled to the second award of attorney fees because the motion for reconsideration was frivolous or because respondent failed to plead fraud with particularly after respondent filed her second objection (with the aid of counsel) to the second award of attorney fees.

In any event, we hold that sanctions are not justified under MCR 2.114(E). MCR 2.114(D) provides that a signature of an attorney or a party is a certification that "the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law[] and . . . is not interposed for any improper purpose . . . ." MCR 2.114(D)(2), (3). Although petitioner challenges any assertion that he signed the August 4, 2004 withdrawal request with a fraudulent intent, he has not demonstrated that respondent's allegation was not well-grounded in fact. A review of the withdrawal request form shows that petitioner wrote respondent's name in the space designated for the name of the account owner, thereby acknowledging that she was the account owner. But he then signed the document on the signature line designated for the account owner, underneath the following declaration: "I certify that . . . my social security number . . . as set forth in Section[] 2 [is] . . . correct, true, and complete . . . ." The social security number provided is the same as that on a subsequent withdrawal request form respondent completed and signed. Accordingly, although an innocent explanation may exist regarding the filing of the August 4, 2004 withdrawal request, respondent's allegations of fraud were nonetheless well-grounded in fact. MCR 2.114(D)(2).[1]

Petitioner also argued that the motion for reconsideration was frivolous because it did not list the elements of fraud. Petitioner argued that MCR 2.112 imposes such a requirement. MCR 2.112(B)(1) states, "In allegations of fraud . . . the circumstances constituting fraud must be stated with particularity." Clearly, nothing in MCR 2.112 required respondent to set forth the elements of fraud. Rather, the court rule requires that the "circumstances constituting fraud . . . be stated with particularity." MCR 2.112(B)(1). Our review of the record shows that respondent satisfied this requirement.

Finally, petitioner argued that the motion for reconsideration was frivolous because respondent called the authorities regarding the August 4, 2004 withdrawal request, but petitioner was never prosecuted. We are not aware of any theory by which someone's actions before

[1] Also, the trial court did not find that the allegation of fraud was made for an improper purpose.

litigation would render a subsequent motion for reconsideration following a second award of attorney fees frivolous.

We reverse the award of all attorney fees but affirm the trial court's order that petitioner pay the $150 guardian ad litem fee. We remand for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Jane E. Markey